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COMMENTARY

CARVING HOLES IN THE SHERMAN ACT: A COMMENT ON THE *CITIZENS & SOUTHERN* CASE

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In the 1973-74 Term, the "new antitrust majority"[1] of the Supreme Court made serious inroads upon antimerger enforcement by its decisions in *United States v. General Dynamics Corp.*[2] and *United States v. Marine Bancorporation.*[3] In the 1974-75 Term, the Court made further inroads upon antitrust enforcement in another case involving a merger, *United States v. Citizens & Southern National Bank (C&S).*[4] The *C&S* case, however, was not confined to a merger question, nor was the majority's axe confined to chopping holes in antimerger law. Rather, the Court also struck at four other highly important facets of antitrust law: the idea that price fixing is illegal, the concept that alleged procompetitive aspects of a restrictive practice will not immunize it from being declared an illegal restraint of trade, the idea that the lawfulness of a practice is measured as of the time of suit rather than as of a prior date, and the intra-enterprise conspiracy doctrine.

It is somewhat surprising to see the Court make inroads upon the foregoing doctrines. The rule that price fixing is illegal must be counted as the most venerated doctrine of antitrust. Indeed, just one day before the *C&S* opinion, the Court in *Goldfarb v. Virginia State Bar*[5] extended the

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1. This is Justice White's characterization of the majority opinion in United States v. Marine Bancorporation, 418 U.S. 602 (1974). *Id.* at 642 (White, J., dissenting) (The majority opinion was authored by Justice Powell and joined in by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist).
2. 415 U.S. 486 (1974).
3. 418 U.S. 602 (1974).
4. 422 U.S. 86 (1975).
5. 421 U.S. 773 (1975).

strictures against price fixing by declaring that learned professions enjoy no antitrust exemption and that minimum fee schedules recommended by bar associations constitute unlawful price fixing. Although the Court has on occasion discussed possible exceptions to the doctrine which asserts that procompetitive effects will not justify an otherwise anticompetitive restraint of trade,[6] it has vigorously applied the doctrine in some of the most important cases of the last decade.[7] The idea that the legality of a practice must be determined as of the time of suit seems to have been more visible under section 7 of the Clayton Act[8] than under section 1 of the Sherman Act,[9] but it nevertheless appeared to be reasonably well established as antitrust doctrine.[10] Finally, although the intra-enterprise conspiracy doctrine is not as venerated as the price fixing rule and does not rest on as logical a base, it has been applied a number of times by the Court.[11] Thus, the Court's opinion in *C&S*, which begins to erode these doctrines, must be viewed as something of a surprising earth tremor, if not a seismic shock, for antitrust enforcement.

I. Factual Background of *C&S*[12]

Citizens and Southern Bank is the predominant bank in the Atlanta, Georgia area. Its Atlanta offices increased from three in 1946 to more than 100 at the time the case was tried. C&S and the next two largest banks in the Atlanta area control approximately 75 percent of the local banking business.

For many years, Georgia prohibited banks located in cities from opening suburban branches.[13] Because of this restriction, C&S began forming de

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6. *See, e.g.*, IBM v. United States, 298 U.S. 131, 140 (1936).

7. *See* United States v. Topco Associates, 405 U.S. 596 (1972); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Sealy, Inc., 388 U.S. 350 (1967).

8. 15 U.S.C. § 18 (1970).

9. *Id.* § 1.

10. *See* United States v. General Dynamics Corp., 415 U.S. 486, 504-08 (1974); United States v. Penn-Olin Chemical Co., 378 U.S. 158, 168 (1964); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

11. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 338 U.S. 338 (1949).

12. The principal source for background information is the Supreme Court's opinion in *C&S*.

13. Act of Feb. 27, 1956, No. 195, [1956] Ga. Laws 309. This Act prohibited a bank holding company from acquiring more than 15 percent of a suburban bank's voting stock. In 1960, the law was changed to prohibit a bank holding company from acquiring more

facto branch banks in the suburbs. It sponsored the founding of five such banks and acquired five percent ownership of a previously independent suburban bank. C&S filed the charter applications for the new branch banks, which in form were independent corporations. It also assured the branch banks of financial support, often an essential element in securing regulatory approval for them. Each of the branch banks was a "correspondent associate" in the C&S system, with five percent of their stock owned by C&S's holding company. Much of the rest of the stock was owned by parties friendly to C&S: its officers, employees, and friendly customers.

Additionally, C&S provided the branch banks with manuals and memoranda covering all possible banking problems and procedures. These documents included information concerning interest rates and service charges. The pricing data was stamped "for information only"; each de facto branch was cautioned to use its own judgment in setting rates and charges; and each was told that the antitrust laws required the use of independent judgment. However, C&S bulletins also exhorted the branches to "get the rates [on loans] up," and in fact, the rates and charges of the branch banks did not vary significantly from those of C&S.[14]

In 1970, Georgia amended its banking laws in a manner that permitted C&S to convert the de facto branches into de jure branches,[15] and C&S moved to acquire the branch banks. The United States then brought suit against the acquisitions under section 7 of the Clayton Act, and also alleged that the ongoing correspondent associate relationships were restraints of trade in violation of section 1 of the Sherman Act. The Government sought injunctive relief against both the merger and the ongoing restraints of trade.

II. The Major Issues

A. *The Question of Price Fixing—The Per Se Charge*

In asserting that the correspondent associate relationships involved unlawful price fixing in violation of section 1 of the Sherman Act, the

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than five percent of a suburban bank's voting stock. GA. CODE ANN. § 13-207(a)(2) (1967).

14. The Supreme Court noted that:

> The District Court observed that in fact prices did not often vary significantly among the 5-percent banks or between these banks and C&S National, but the court attributed this to the "natural deference of the recipient to information from one with greater expertise or better services."

422 U.S. at 113, *quoting* United States v. Citizens & Southern Nat'l Bank, 372 F. Supp. 616, 628 (N.D. Ga. 1974).

15. GA. CODE ANN. § 13-203.1(a) (Supp. 1975).

Government asserted that there was a per se violation or, in the alternative, that the arrangement was unreasonable. It lost on both counts.

Addressing itself to the per se charge, the Court stressed that the de facto branch banks were founded by C&S and probably would not exist but for the latter.[16] The creation of the branches thus allowed C&S to extend its services to new markets, to offer a competitive choice to customers in relatively small markets which otherwise might be subject to monopoly or oligopoly, and to give to customers the benefit of sophisticated services.[17] The Court noted that while some of the C&S memoranda to the branches could be construed as advocating price uniformity, they were stamped "for information only" and contained admonitions concerning the antitrust laws and the need for independent judgment.[18]

The Court went on to suggest that if the case had dealt with independent competitors having no permissible reason for close and continuous cooperation, then perhaps there could not be a valid finding that a price fixing conspiracy did not exist.[19] Because the correspondent associate program is legal under the Sherman Act, however, it was not clearly erroneous for the district court to rule that under the particular circumstances the lack of price competition stemmed not from unlawful tacit agreement "but instead was an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate program."[20]

Although the arguments offered by the Court were not necessarily unpersuasive, it is remarkable that they carried the day. There have been many prior cases in which persuasive arguments were made in favor of various forms of price fixing, yet the Court, believing that price fixing is simply too dangerous to the economy to be permitted, had previously refused to allow it.

16. 422 U.S. at 111. The only exception was one bank which had previously existed as an independent competitor. The Court found that C&S's relationship with this bank was immunized from a violation of section 1 of the Sherman Act by the 1966 amendments to the Bank Holding Company Act, 12 U.S.C. § 1848(d) (1970). 422 U.S. at 111 n.21. Thus, the Court characterized the case as involving "*de facto* branching through the formation of new banking units, rather than through the acquisition, and consequent elimination, of pre-existing, independent banks." *Id.* at 111. The Court noted that "[*d*]*e facto* branching through the *de facto* 'acquisition' of pre-existing banks might raise [different Sherman Act questions]." *Id.* n.21.

17. *Id.* at 112.

18. *Id.* at 113.

19. *Id.* at 113-14.

20. *Id.* at 114. The district court had attributed the lack of price competition to the "natural deference of the recipient [the de facto branches] to information from one with greater expertise or better services." 372 F. Supp. at 628, *cited at* 422 U.S. at 113.

For instance, fears of ruinous competition have not justified the fixing of prices on the ground that it is necessary to forestall chaos in an industry.[21] Likewise, vertically imposed maximum resale prices have been found illegal[22] although they could have been justified as fostering the delivery of more goods at cheaper prices;[23] as promoting efficiency in the distribution system;[24] and, when wholesalers or retailers individually enjoy a monopoly position in their resale market, as protecting consumers from price gouging, a function performed by competition in markets where the latter exists.[25] Additionally, the doctrine formulated in *United States v. Colgate & Co.*,[26] which at least impliedly sanctioned price fixing, has also been reduced virtually to the point of uselessness[27] even though it can be argued that efforts to prevent discounting are vital to protect a manufacturer's good will and the viability of vast systems of distribution. Another form of price fixing, consignment agreements under which manufacturers control the price to consumers, has been outlawed even though the manufacturers still owned the product and the arrangement was predicated on long standing precedent.[28] Likewise, the exchange of information about the prices at which sales were made was outlawed[29] despite strong argument that the exchange was procompetitive because it gave sellers knowledge which enabled them to engage in active price competition and the trend of prices had in fact been downward.[30] Nor can one overlook the fact that the presence of price fixing is said to contaminate vertical customer and territorial restrictions ancillary to it even if they might otherwise be lawful and procompetitive.[31]

None of this is to say that the Supreme Court has never protected arrangements which arguably constitute price fixing conspiracies. In cases such as *Board of Trade v. United States*[32] and *Appalachian Coals, Inc. v.*

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21. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 330 (1897).

22. Albrecht v. Herald Co., 390 U.S. 145 (1968).

23. *See id.* at 157-58 (Harlan, J., dissenting).

24. *See id.* at 160 n.4, 167.

25. *See id.* at 166-67; *id.* at 169-70 (Stewart, J., dissenting).

26. 250 U.S. 300 (1919). The practice authorized by the Court was Colgate's publication of uniform prices followed by sales to dealers who would agree to sell at such prices and refusals to sell to dealers who would not so agree.

27. *See* United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

28. *See* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

29. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969).

30. *See id.* at 342-43 (Marshall, J., dissenting).

31. *See* White Motor Co. v. United States, 372 U.S. 253, 260 (1963).

32. 246 U.S. 231 (1918).

United States,[33] the Court's decisions gave legal sanction to schemes which can be considered to have involved price fixing. Yet, on balance, the decisions have been by far the other way. Thus, even though one may find its reasoning persuasive, the Court's decision in *C&S* is surely a departure from traditional notions concerning the per se illegality of price fixing. Moreover, the decision opens the question of whether the current Court, which hardly seems enamored of the antitrust laws in any event,[34] will prove amenable in future cases to blandishments that price fixing should not be per se illegal, since it may be procompetitive. While it is true that the Court's decision in *C&S* appears to be based in part on the peculiar facts of the case,[35] it is equally true that, at one point, the Court appeared to be almost embarrassed by its decision.[36] The fact remains that if the creation of de facto branches justifies price fixing because their genesis is said to beget competition, then by parity of reasoning, price fixing can be justified in other cases in which it can be said to beget or preserve competition as, for example, cases in which intrabrand price fixing would help create interbrand competition. Furthermore, if procompetitive price fixing is legal, then perhaps the vertical fixing of maximum prices should be legal in naturally monopolistic resale markets in which such maximum prices perform the price restraining function normally performed by competition.

As noted above, the majority's acceptance of a rationale for price fixing in the *C&S* case may, because of the Justices' natural inclination or the analogical pull of precedent, herald an enhanced susceptibility in other cases. Such susceptibility would not only do serious damage to a basic per se rule which has been a mainstay of antitrust enforcement, but would also vastly diminish two other primary benefits associated with per se rules: the conservation of judicial time and energy, and the creation of greater certainty for business by making a practice illegal without need for the

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33. 288 U.S. 344 (1933).

34. In addition to *C&S*, *Marine Bancorporation*, and *General Dynamics*, other decisions evidencing the majority's disfavor with antitrust law include United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975); Gordon v. New York Stock Exch., Inc., 422 U.S. 659 (1975); United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975); Connell Constr. Co., Inc. v. Plumbers Local 100, 421 U.S. 616 (1975); and Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

35. *See, e.g.*, 422 U.S. at 112, for the Justices' view that the de facto branch program created new banks and competition which otherwise would not have existed.

36. *See id.* at 113-14. The Court ruling was merely a technical finding that it could not find the district court's decision to be clearly erroneous; it indicated, however, that there probably would have been a violation if C&S and the branches were truly independent competitors. *Id.*

elaborate and lengthy economic inquiries which often cause antitrust litigation to be so protracted.[37]

One last point worthy of note in regard to the Court's decision on the per se question is the majority's remarkable willingness to accept highly self-serving evidence as proof of a lack of illegal agreement: the reference being to the stamping of "for information only" on C&S price memos sent to the branches and the admonitions to the branches concerning the need for independent judgment, particularly under the antitrust laws. The dissent thought the defendants' arrangements were an "elaborate fabric of 'consultations' " and " 'advice and guidance,' "[38] a view of the matter that would appear to be far less naive—or perhaps far less a deliberate disregard of reality—than the majority's. This is particularly so given the lack of significant price competition and the overwhelming control of the branches by C&S. One can hardly escape the conclusion that in past cases, such as *United States v. Container Corp. of America*,[39] far less has sufficed to cause defendants to be found guilty of unlawful price fixing.

That the Court afforded great credence to this evidence in *C&S* signifies nothing less than an invitation to businesses and their counsel to manufacture self-serving but essentially phony admonitory documents whose chief use will be for litigation. Further, the Court's facile acceptance of the evidence stands in contrast to earlier merger cases in which the Court had not given much weight to similar declarations or documents.[40] One is left with the suspicion that the deference shown to the documents in *C&S* is a further indication that the majority is ready to make inroads upon the per se price fixing rule.[41]

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37. *See* United States v. Container Corp. of America, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); White Motor Co. v. United States, 372 U.S. 253, 262 (1963); *cf.* R. POSNER, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 129 (1974).

38. 422 U.S. at 132 (Brennan, J., dissenting).

39. 393 U.S. 333 (1969).

40. *See, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-36 (1973); United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174-76 (1964).

41. The credence given by the majority to C&S's self-serving evidence is reminiscent of the judiciary's performance in United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1969), and Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969). In the former, Judge Timbers appeared to accept the word of Harold Geneen, President of International Telephone and Telegraph Corp. (ITT), that ITT's methods and motives in merging with Avis were the most pure. 306 F. Supp. at 783, 790. Given the wrongdoings under Mr. Geneen's leadership which were subsequently uncovered in connection with Watergate, including wrongdoings related to the antitrust case, one may wonder at Judge Timbers' credulousness. In *International Controls Corp.*, Judge Friendly exercised enormous ingenuity in twisting matters so as to find that the actions of ICC's president were not serious violations of securities law but rather were actions of a mere innocent, taken in good faith and

B. The Question of Price Fixing—The Reasonableness Argument

The Court's Opinion. The Government argued that the correspondent associate relationship went far beyond the normal correspondent bank relationship and therefore unreasonably restrained competition among the five percent banks and between those banks and C&S. Although pointing out that there is no fixed definition of a correspondent relationship, the majority admitted that the C&S program did appear to have gone beyond conventional correspondent arrangements.[42] It further admitted that "[i]t is conceivable that these relationships, separately or taken together, have restrained competition among the defendant banks more thoroughly or effectively than would have a conventional correspondence program."[43]

Yet this finding did not make the arrangements illegal. Rather, the Court noted that, while it is true that the "central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion"[44] rather than by agreements with competitors and that even commonly owned firms must compete with each other if they hold themselves out as distinct entities,[45] C&S had previously been restrained by state law from reaching the suburban market through internal expansion.[46] Since the majority determined that "*de facto* branching was the closest available substitute,"[47] it asserted that the purpose and effect of the de facto branches, rather than being to restrain trade, was to defeat a state-imposed restraint of trade which, in effect, made suburban, small town, and rural areas captive markets for small banks. The Court concluded that it was therefore procompetitive for C&S to circumvent the law by providing new banking options while not eliminating existing ones.[48]

Whether a more conventional correspondent relationship would have been equally procompetitive was regarded as mere speculation by the Court, which noted that one could not be sure that such a conventional relationship would have enabled C&S to bring the full range of its services to the suburban market.[49] Further, the Court indicated that not only was it unrealistic to assume C&S might have founded new banks which might have

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pursuant to worthy motives. At the time of the case, ICC's president was relatively unknown. In due time his name, Robert Vesco, became more widely known.

42. 422 U.S. at 115-16.
43. *Id.* at 116.
44. *Id.*
45. *Id.*
46. *Id.* at 117.
47. *Id.*
48. *Id.* at 118-19.
49. *Id.* at 119.

competed with it, but such an assumption totally disregarded the fact that C&S's ultimate goal was always to acquire the branches as soon as legally possible.[50]

Permitting Anticompetitive Restraints To Be Justified By Procompetitive Elements. In holding that an anticompetitive restraint such as price fixing can be justified if it stems from a procompetitive relationship, the Court broke away from the reluctance of recent years to permit such restraints. The relevant line of recent cases involved interbrand versus intrabrand competition. In *White Motor Co. v. United States*,[51] for example, the Court felt that not enough was yet known about vertical customer and territorial restrictions to declare them illegal per se, and stated: "They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . ."[52] The Court went on to note that the precise character of such a restriction in a given case could only be determined at trial.[53]

But in *United States v. Sealy, Inc.*,[54] decided just four years after *White Motor Co.*, the Court brushed aside arguments that exclusive territories are procompetitive when they enable small businessmen to jointly compete with large companies through use of a common name and common advertising, and stated that the exclusive territorial arrangement at issue was horizontal rather than vertical and must therefore fall as being incident to an aggregation of restraints, including price fixing. In *United States v. Arnold, Schwinn & Co.*,[55] decided the same day as *Sealy*, the Court rejected the argument that vertical territorial and customer restrictions, uncontaminated by price fixing, should be upheld as promoting interbrand competition when a manufacturer sells its product to distributors. Rather, such restrictions were ruled to be per se violations which could be imposed only if the manufacturer marketed the product through an agency arrangement rather than through sale, and, even then, they would be illegal if unreasonable.[56]

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50. *Id.*
51. 372 U.S. 253 (1963).
52. *Id.* at 263.
53. *Id.* at 263-64.
54. 388 U.S. 350 (1967).
55. 388 U.S. 365 (1967).
56. *Id.* at 379-80. Interestingly, while the Court felt that such restrictions in agency arrangements would be procompetitive because they would allow small manufacturers to compete with larger organizations, *id.*, it is precisely small manufacturers who would be least able to afford the carrying costs of an agency system of distribution and who thus could not be competitive on such a basis.

Finally, in *United States v. Topco Associates, Inc.*,[57] the Court rejected the claim that exclusive territories and customer restrictions for private brand labels should be allowed for members of a grocers' cooperative in order that they might better compete against the giant food retailers who have their own label brands. In a significant discussion, the Court wholly rejected the concept that the judiciary was competent to, or permitted to, weigh a diminution in competition in one segment of the economy against an increase in another segment. Such weighing, said the Court, is for Congress alone.[58]

It is clear, therefore, that in weighing procompetitive aspects in assessing the legality of the correspondent associate relationship in *C&S*, the Court retreated from its former position. In a sense, the retreat can be considered to have occurred in an interbrand versus intrabrand case like the previous ones, since the question in *C&S* was really whether "intrabrand" competition among members of the C&S family could be sacrificed in favor of "interbrand" competition between the C&S family and other banks. In a different sense, however, the retreat is much worse for antitrust enforcement than it would have been in prior cases. In *C&S*, the Court weighed interbrand competition in assessing the legality of a price fixing arrangement, long considered the most heinous of antitrust violations, whereas, at least at the Supreme Court level, the prior cases had not involved price fixing. Indeed, it was asserted in the prior opinions that restraints that were ancillary to price fixing would not be upheld even if they might be lawful when not connected to price fixing.[59] If the Court is willing to weigh procompetitive elements in a price fixing case like *C&S*, then it can be expected that it will be willing to weigh them in virtually every kind of case.

The *C&S* case also presents an excellent example of the wisdom expressed in *Topco* regarding the judiciary's lack of ability to competently assess the pros and cons of interbrand versus intrabrand competition. One important element of the *C&S* opinion, for instance, is the Court's assertion that by de facto branching C&S brought new competition and services to suburban areas which would otherwise be captive to small unit banks.[60] The truth of the Court's assertion is hardly self-evident—indeed, it is more likely to be outright nonsense. The state of Illinois, for example, long has had a law forbidding branching by commercial banks, confining them to a single location.[61] Yet this did not prevent some of the country's largest banks

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57. 405 U.S. 596 (1972).

58. *Id.* at 609-10.

59. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375-76 (1967); White Motor Co. v. United States, 372 U.S. 260 (1963).

60. 422 U.S. at 118.

61. ILL. ANN. STAT. ch. 16½, § 106 (Smith-Hurd 1972). The only exception to

from growing up in Chicago, and these banks can and do serve the needs of, and provide competitive alternatives for, customers in the vast Chicago suburban area.

Similarly, in Washington, D.C., a current complaint is not that the banks located in the city fail to service suburban needs or to provide competitive alternatives there, but that they service suburban areas to a far greater extent than they service customers in the District of Columbia itself.[62] While I do not know what the precise situation was in Atlanta, I would consider it rather amazing if a bank with 100 branches like C&S could not service suburban customers in a metropolitan area smaller than the Chicago metropolitan area. People who need money will go downtown or across the city line to get it. Perhaps de facto branching could provide competition and services that would otherwise be lacking in small towns far removed from a major city, but such branching hardly seems necessary in order to provide alternatives in the suburbs.

Although the Court may very well have been correct in its conclusion, there is another example in the *C&S* opinion which arguably shows that the judiciary lacks competence to weigh interbrand versus intrabrand competition. The example concerns the Court's highly skeptical treatment of less restrictive alternatives to the correspondent associate relationship.

As a preliminary confession of an ex-government lawyer, who like his brethren did not meet payrolls but nevertheless dreamed up less restrictive alternatives which businessmen assertedly could use, I confess to sometimes being uneasy with the imagined alternatives which allegedly would be workable in the real world. Yet, given the tremendously dominant oligopolistic position of C&S and its two biggest competitors in the Atlanta market, and given the vital importance of banking and the cost of credit to the entire economy,[63] one wonders whether the Court's skepticism should not have given way to a more hospitable acceptance of the possibility of less restrictive alternatives which would have increased competition in the banking sector.

The question of alternatives basically was whether, in the absence of the correspondent associate relationship, a more conventional and more procom-

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this rule permits drive-in banks within 1,500 feet of the main bank. Such drive-in facilities are limited in the business they may transact and are not considered branch banks or branch offices. *Id.* § 105(15).

62. The banks in Washington have come under fire for the practice of "redlining," that is, using funds deposited by inner city residents to make loans to suburban residents while refusing to make loans to the same inner city residents. *See* Washington Post, May 12, 1975, § B, col. 1.

63. This factor has been stressed in past antitrust cases. *E.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963).

petitive correspondent relationship would have arisen. The majority felt not, on the grounds that the possibility of greater competition in a conventional relationship was speculative and that it was unrealistic to assert that C&S would have founded banks which would have competed with it and with each other.[64] The dissent felt, however, that C&S might have sponsored conventional correspondent banks because such banks would have promoted a profitable demand for C&S's services.[65] Moreover, if the merger were struck down, the dissent thought competition could well increase because the increasingly experienced de facto branches might begin to assume a more independent posture and C&S itself might open de jure branches in the suburbs.[66]

There is no way of knowing with certainty which side is correct, since each engaged in speculation. This very uncertainty, however, may indicate that, as recognized in *Topco*, the courts are not competent to, and should not, assess procompetitive versus anticompetitive aspects in an area like price fixing. This is even more true when the judicial decision does not aid a small or new firm seeking entrance to a market but instead may well foster increased dominance by an already dominant firm in an oligopolistic market. Since many provisions of the antitrust laws are directed against strong concentrations of economic power, the courts are acting contrary to the oft-expressed will of Congress when they are hospitable to arguments fostering such concentrations.

C. *The Time of Suit Doctrine*

In asserting that the de facto branch banks were a procompetitive method of circumventing the state's antibranching law, the Court completely ignored the fact that the law had been changed. As pointed out by the dissent, by the time the Government brought suit it had become lawful for C&S to enter the suburban market by founding new de jure branches or through a toehold acquisition.[67] Since de novo entry would add competitors to the market, the continuation of a correspondent associate relationship in its stead would mean fewer competitors and less competition even without a merger between C&S and the de facto branches. In short, even if the founding of the de facto banks was a procompetitive maneuver when the state's antibranching laws existed, the continuation of the correspondent associate relationship became anticompetitive when the state laws were changed.[68]

64. 422 U.S. at 119.
65. *Id.* at 144 (Brennan, J., dissenting).
66. *Id.* at 149.
67. *Id.* at 142-43.
68. Justice Brennan suggested that if C&S's acquisition of the de facto branches were

The doctrine that an arrangement which was once legal can become illegal is not a new one in antitrust. Its most visible use in the Supreme Court's antitrust jurisprudence is in the merger area, in which the clear meaning of the *United States v. E. I. du Pont de Nemours & Co.*[69] decision is that a merger legal at its inception can later be successfully assailed under section 7 of the Clayton Act if it threatens competition at the time of suit. In the area of restraints of trade under section 1 of the Sherman Act, the doctrine is not as well developed in Supreme Court opinions, although it has been clearly articulated in a lower court decision involving a tie-in allegedly made necessary by the technological state of the art.[70]

At the Supreme Court level, the doctrine appears to exist in section 1 of the Sherman Act cases mainly by implication. For example, in both *Schwinn*[71] and *White Motor Co.*,[72] the Court pointed out that certain restraints could conceivably be necessary to enable a new or small company to break into or stay in a market. A logical implication would be that restraints which are necessary and therefore legal for such purposes would lose these characteristics if the small company grew into a giant or otherwise became highly entrenched.

The dissent in *C&S* would have followed the *du Pont* time of suit doctrine,[73] a view which is far from appealing, since the entire doctrine is subject to several objections. First, it enables the government to undo long-standing arrangements which not only may have been originally procompetitive and legal, but whose future, anticompetitive effects could not have been foreseen at their inception. Moreover, the doctrine forces business executives and their counsel to try to decide when an ongoing arrangement has become illegal and need cease. This is a difficult task intellectually and can create severe uncertainty, although it is perhaps not more difficult nor productive of greater uncertainty than an original determination as to whether a particular practice violates any one of a host of laws at their inception. The task of redecision also runs up against the very real human problem that persons are loath to end a successful business practice—a money-making status quo naturally has a powerful attraction. Yet failure to end a practice when conditions have changed to the point at which a court

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enjoined, "[t]he formation of *de jure* branches, ultimately in competition with former correspondent associates,' would be a plausible result." *Id.* at 149.

69. 353 U.S. 586 (1957).

70. *See* United States v. Jerrold Elec. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

71. 388 U.S. at 374.

72. 372 U.S. at 263.

73. 422 U.S. at 143 (Brennan, J., dissenting).

would find that it has become illegal can result in heavy treble damage liability, even if criminal penalties would not be sought.

While the dissent's view is not terribly felicitous, it is in its favor that the change in the state law to permit de jure branching was such a dramatic alteration that it would ease the burden upon private parties of deciding whether the correspondent associate relationship had become anticompetitive and illegal even if it were once procompetitive and legal. On balance, it may be that the majority's position is the sounder on this matter. But again, the question is raised as to whether the majority will adhere to its view in other cases in which the conditions surrounding an arrangement have changed considerably. This may be more a problem of section 7 of the Clayton Act than a problem of section 1 of the Sherman Act, since in the past the question has been most directly faced by the Supreme Court in the merger area rather than the restraint of trade area. In any event, if the majority in *C&S* is willing to carry its view into widespread application, this would mean the undoing of the *du Pont* time of suit doctrine.

D. The Intra-enterprise Conspiracy Doctrine

The Court's unwillingness to apply the intra-enterprise conspiracy doctrine—the doctrine that corporations belonging to the same corporate family will be guilty of violating the law if they make agreements on prices, markets, and the like—is contrary to a number of past cases.[74] Arguably, it was desirable for the Court to break with those cases, since the intra-enterprise doctrine has definite weaknesses. For example, when two corporations are part of a single corporate family—which excludes the situation in which a subsidiary is formed as a joint venture between two independent corporate families—joint action between the parent and subsidiary is really action by the same economic unit. It is questionable whether antitrust rules designed to prevent joint action between independent enterprises should be applied when the two parties are really part of the same enterprise.

But while the Court broke with the intra-enterprise doctrine in *C&S*, it did not appear to want to scrap it entirely, despite the doctrine's weaknesses. Rather, the Court tried to narrow its inroads upon the doctrine by acknowledging prior applications of the doctrine, by pointing out that growth by internal expansion rather than treaty is a central message of the Sherman Act, by being willing to assume that ordinarily a business could not justify a restraint of trade between itself and an independent competitor on the ground that it had helped to launch the latter, and, most importantly, by stressing that the establishment of the de facto branches was not an

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74. *See* cases cited note 11 *supra*.

anticompetitive act, but a procompetitive response to the anticompetitive Georgia law which prohibited branch banking and which thereby allegedly made suburban and rural areas captive to small unit banks.[75]

Yet, although the Court sought to narrow its inroads, it is somewhat difficult to see why a great deal of its logic could not be applied to a host of other cases which can readily arise—for example, the common garden variety business practice of forming a new subsidiary corporation to produce or distribute the corporate parent's product in another market. In reality, the formation of this new corporation constitutes internal expansion by the original corporation even though a separate corporate form is utilized. Moreover, the launching of a new corporation to increase productive or distributive capacity is a procompetitive act. Finally, one could say, as did the Court in *C&S*, that it is unrealistic to believe that the corporate parent would have launched its progeny unless it could control the subsidiary's prices and policies. Thus the claim for exemption from the intra-enterprise conspiracy doctrine seems as strong here as in the *C&S* case.

Of course, there is a possible difference in the two cases. For a period of time, the Georgia law prevented C&S, if it wished to expand to the suburbs, from having any choice other than launching a new bank in a separate corporate form. However, in the more common case, a corporation can choose whether to launch the new enterprise as a separate corporation or as a branch of the existing corporation. Since the choice of form exists in the latter case, it is easier there than in *C&S* to make the intra-enterprise conspiracy argument that, having deliberately "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."[76]

It seems harsh, however, to make the application of the intra-enterprise doctrine turn on whether state law formally bars a de jure branch or instead gives a choice of form to the parent corporation. Often there are important business and legal reasons, having to do with critical matters such as taxes or liability, for deciding that the new business should take the form of a separate corporation rather than a branch of the existing corporation. In assessing whether to apply the intra-enterprise doctrine, there does not appear to be any logical reason why such important business considerations should be given short shrift while great weight is given to formal legal bars such as those in Georgia.

75. 422 U.S. at 116-19.

76. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968).

Moreover, in regard to the existence of choice, one might point out that while, for a period, Georgia law prevented C&S from exercising any choice other than separate corporate forms if it wished to expand into the suburbs, nothing compelled C&S to choose to expand into the suburbs in the first place. In that regard it had choice, and having chosen to expand, why should it be able to free itself "from any of the obligations that the law imposes on separate entities?"[77] Perhaps one might say that it should be freed of such obligations in order to encourage internal expansion, a central purpose of the Sherman Act. But on the other hand, not only the Sherman Act, but many of the other provisions of the antitrust laws as well, have the central purpose of preventing the kind of dominance and concentration of power which was at issue in the *C&S* case.

III. Conclusion

In both the *Marine Bancorporation* case of the 1973-74 Term and the *C&S* case of the last term, the Supreme Court stressed the existence of legal barriers to entry faced by large banks seeking to expand into new geographical areas. In both cases, the majority alleged the unlikelihood that the large banks reasonably could expand into the target area in a less anticompetitive fashion than was actually chosen.[78] The majority's allegation caused the dissent in *Marine Bancorporation* to accuse the Court of "imposing its own visions of reality in commercial banking markets,"[79] and it seems the same criticism should be leveled at the majority in *C&S*.

It seems, moreover, that the majority's vision of competitive reality is not necessarily the same view as that reflected by the antitrust laws. The actions permitted by the Court in *Marine Bancorporation* and *C&S* were taken by large and dominant banks, and readily could or did lead to a further concentration of economic power. In approving these actions, the Court's attitude appeared to be quite favorable to "big business competition," as can be seen from its view that C&S's move into the suburbs brought a range of services to a market which otherwise was captive to small unit banks. Yet one can surely doubt that the antitrust laws were designed to be so hospitable to increased concentrations of power at the expense of competition among a greater number of potential entities. Such doubts are particularly strong when the actions of the big business units are not necessary to enable them to provide services in the relevant market. Indeed, in the context of the goals of the antitrust laws, one can say not only that the Court

77. *Id.* at 142.
78. *See* 422 U.S. at 118-20; 418 U.S. at 632-40.
79. 418 U.S. at 655 (White, J., dissenting).

acted questionably in *Marine Bancorporation* when it approved a concentration-increasing arrangement by a dominant entity despite section 7 of the Clayton Act,[80] but also that its action in *C&S* was almost an outrage when it approved a concentration-increasing arrangement by a dominant entity despite the price fixing rules of section 1 of the Sherman Act.

The current majority's seeming hospitality to "big business competition" in the banking arena leads one to ask whether, in nonbanking areas in which purely legal bars to entry and growth often are not as prevalent,[81] the Court will display the same solicitude for anticompetitive actions by which the big get bigger despite the antitrust laws.[82] The answer is probably yes. In the last analysis, one's view of a case depends on one's view of the antitrust laws, competition, and concentration. The current Court's view does not seem to augur well for antitrust. Thus, the most likely probability is that in future cases the Court may well seize on business or economic bars to entry or growth as a reason for approving actions that just a few years ago would have stood little or no chance of legal success.

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80. Indeed, the Court indicated that it will almost never be possible to bar a bank merger using the theory of potential competition. *See* 418 U.S. at 641-42.

81. Even in banking, the bars to entry and growth may be far less insuperable than the Court would suggest. The growth of C&S from three to 100 branches is itself a most impressive indication of the possibilities for a small bank to grow to a significant size.

82. In regard to the Court's attitude toward big business, it is interesting to note that even Justice Blackmun, a member of the "new antitrust majority," has accused the Court of exhibiting "a preternatural solicitousness for corporate well-being." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).